

1 BARRY J. PORTMAN  
2 Federal Public Defender  
3 JOYCE LEAVITT  
4 Assistant Federal Public Defender  
5 555 - 12th Street, Suite 650  
6 Oakland, CA 94607-3627  
7 Telephone: (510) 637-3500  
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9 Counsel for Defendant SHIVERS  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,	)	No. CR 07-00346 SBA
	)	
12 Plaintiff,	)	<b>DEFENDANT'S SENTENCING</b>
	)	<b>MEMORANDUM</b>
13 vs.	)	
	)	Date: January 29, 2008
14 DAVID C. SHIVERS,	)	Time: 10:00 a.m.
	)	Courtroom No. 3
15 Defendant.	)	
_____	)	

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**INTRODUCTION**

On January 29, 2008, defendant David C. Shivers will plead guilty to count one of a two count indictment which charges him with a violation of 21 USC §841(a)(1) and (b)(1)(B)(iii) - possession with intent to distribute cocaine base. He will be sentenced for this offense on the same date. A pre-plea report ("PPR") was prepared by United States Probation Officer ("USPO") Christina Carrubba. The USPO recommends that Mr. Shivers be sentenced to 60 months in custody which is consistent with the recommendation in the Rule 11(c)(1)(C) plea agreement. PSR, Sentencing Recommendation. It is also the mandatory minimum sentence required by statute such that the Court can not sentence Mr. Shivers to less than 60 months.

1 Mr. Shivers disagrees with the UPSO's determination that an enhancement for reckless  
 2 endangerment is appropriate. He believes that the final offense level should be 23, rather than  
 3 25, with a guideline range of 51-63 months, rather than 63-78 months. However, he agrees that  
 4 the mandatory minimum sentence of 60 months in custody is the appropriate disposition.

5 Mr. Shivers files this sentencing memorandum in support of his request. Attached to the  
 6 sentencing memorandum is (a) a letter from David Shivers (Exhibit A);(b) a letter from  
 7 Desmond Meridian (Exhibit B); (c) a letter from Cynthia Warden (Exhibit C), and (d) a report  
 8 from Senior Forensic Scientist Kenton Wong indicating that the weight of the drugs, without  
 9 packaging, is 8.64 grams. (Exhibit D).

## 10 BACKGROUND

### 11 A. Offense Conduct

12 As described in the plea agreement, defendant David Shivers possessed with the intent to  
 13 distribute crack cocaine on March 11, 2007. Mr. Shivers stipulates that the weight of the drugs  
 14 is 11.49 grams, which is the weight calculated by the government. However, he believes that  
 15 this weight must include packaging materials since a defense expert found the weight of the  
 16 drugs without packaging to be 8.64 grams.<sup>1</sup> Exhibit D. Mr. Shivers became involved in the  
 17 offense conduct sometime after he was shot in the wrist in November, 2006, and then became  
 18 unemployed in January 2007 when his father-in-law, who was also his employer, suffered a  
 19 stroke and closed down his construction business. PPR ¶¶51, 52, 55.

20 In addition, David Shivers admits that at the time of his arrest on March 11, 2007, he  
 21 possessed a Smith and Wesson firearm even though he had a prior felony conviction and was not  
 22 allowed to possess a firearm. Plea Agreement at ¶2.

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23  
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 25 <sup>1</sup>The difference between the two weights affects neither the statutory mandatory  
 minimum sentence, nor the guideline calculations.

1 Furthermore, the PPR describes offense conduct which the USPO argues supports an  
2 enhancement for reckless endangerment during flight. While Mr. Shivers does not dispute much  
3 of the conduct, he strongly disputes the applicability of the enhancement to the facts of this case.  
4 For example, David Shivers does not dispute that he resisted arrest and struggled with the  
5 arresting officers. However, the facts indicate that the struggle was between the defendant and  
6 police officers who never numbered less than two. In addition, the firearm which Mr. Shivers  
7 possessed at the time of his arrest had a safety lock on it such that it would not have discharged  
8 accidentally. PPR ¶9. Mr. Shivers was resisting arrest because he was trying to discard the  
9 weapon not discharge it or otherwise threaten others with it. Given the fact that he was  
10 outnumbered by officers whose arsenals included tazers, guns and handcuffs, the only individual  
11 ever really at substantial risk of suffering serious bodily injury or death, was Mr. Shivers  
12 himself. Under these circumstances, the enhancement does not apply.

### 13 **B. Personal Background**

14 David Shivers is a 31 year old father of eight children. When he was young, both of his  
15 parents were drug addicts. PPR ¶44. Mr. Shivers was placed in foster care in 1986, when he  
16 was nine years old. *Id.* Ultimately, Mr. Shivers began selling drugs when he was just 13 years  
17 to help his otherwise homeless mother pay the rent. *Id.* at ¶45.

18 In addition, David Shivers' childhood was surrounded by death as he experienced the  
19 loss of his maternal uncle, his grandfather, his mother and two brothers all at an early age. *Id.* at  
20 ¶51. Mr. Shivers indicated that even today he is overwhelmed with grief because of the deaths  
21 and would like counselling. *Id.*

22 In his letter to the Court, David Shivers says:

23 I know what I did was wrong and . . . I hurt a lot of people. Thank  
24 you for allowing me to spend this time with my family and it let  
me see how much I have hurt them. I know that if I was in the

1 same spot that I have a lot of people whom I can talk too. I know I  
2 will do my best to stay positive and have a good life.

3 Exhibit A. Mr. Shivers' counselor says this of David:

4 I have been in the company of Mr. David Shivers, monitoring and  
5 working closely with him as his spiritual advisor. I can vouch for  
6 his "change of direction" with a firm focus on his developing  
7 better social behavior and his abstinence from both drugs and  
8 alcohol has helped him become a better citizen. . . Losing his  
9 mother while incarcerated and two of his brothers within the same  
time frame had a devastating impact on his growth and affected his  
ability to acclimate to society. . . During my tenure with him he has  
displayed the ability to lead a law abiding life. . . He is a better  
father and husband with ambitions to work and lead a manageable  
life with success and achievement.

10 Exhibit B. *See also* Exhibit C (He is a devoted person to his "wife and children").

### 11 DISCUSSION

#### 12 A. Mr. Shivers' Actions Did Not Cause A Substantial Risk of Death or Serious Bodily 13 Injury

14 In accordance with USSG. §3C1.1, if the defendant recklessly created a "substantial" risk  
15 of death or "serious" bodily injury to another person in the course of fleeing from a law  
16 enforcement officer, increase by two levels. USSG §3C1.2. In this case, Mr. Shivers' actions  
17 did not cause a substantial risk of death or serious bodily injury to anyone except, perhaps,  
18 himself.

19 According to the USPO, the enhancement is applicable because while he was resisting  
20 arrest, David Shivers punched officers and handled a loaded firearm which could have  
21 discharged and struck an officer, himself, or a citizen of the community. PPR ¶23. For the  
22 reasons discussed above, the conduct did not rise to the level where the Court can reasonably  
23 conclude that there was a substantial risk of death or serious bodily injury during flight. First,  
24 Mr. Shivers was outnumbered by the officers such that the only one who might arguably has

1 risked death or serious bodily injury was himself. Given the fact that the officers who  
 2 outnumbered him had weapons, handcuffs and other tools of the trade, there certainly was no  
 3 “substantial” risk of death or “serious” bodily injury to them. Furthermore, the USPO has  
 4 recognized that the gun had its safety on, such that it would not have fired accidentally. PPR ¶9.  
 5 In addition, the only individual transported to the hospital for injuries was the defendant.  
 6 PPR ¶8.

7 In sum, even if Mr. Shivers’ conduct had created “some” risk of bodily injury to another,  
 8 it clearly did not create a “substantial” risk nor was the risk of “serious” bodily injury to another  
 9 other than to himself. Under these circumstances, the enhancement does not apply.  
 10 Accordingly, Mr. Shivers’ guidelines should be at offense level 23 and criminal history II, with a  
 11 guideline range of 51-63 months.<sup>2</sup> This doesn’t change the fact that the parties agree that the  
 12 mandatory minimum sentence of 60 months is the appropriate sentence.

13 **B. A Sentence of 60 Months in custody is Sufficient, But Not Greater Than Necessary,  
 14 to Satisfy the Goals of Sentencing**

15 After *United States v. Booker*, 543 U.S. 220, 260-61, 125 S. Ct. 738 (2005), the  
 16 guidelines are no longer binding on the Court. *Booker* clarifies that the Guidelines are simply  
 17 one of a number of the factors a court must consider in imposing sentence. 125 S. Ct. at 764. In

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18 <sup>2</sup>Defense counsel apologizes to the Court and probation officer for not timely making  
 19 objections to the PPR as there now remains factual disputes which might otherwise have been  
 20 resolved. Counsel was on leave at the time that the final presentence report was disclosed but  
 21 should have gotten comments to the USPO prior to taking leave. At the time that the plea was  
 22 negotiated prior to November 2007, the offense level for the amount of cocaine was two levels  
 23 higher than under the current guidelines. Therefore, although the guidelines are not specified in  
 24 the plea agreement, the parties contemplated that the offense level in this case would be 25 based  
 solely on the amount of the drugs. Under the November 2007 guidelines, however, the offense  
 level has been reduced from 25 to 23 for the same amount of cocaine base. Thus, while the  
 parties anticipated that the guideline range would be 63-78 months, this was based upon the  
 increased offense level for cocaine base rather than an expectation that Mr. Shivers’ guideline  
 would be increased under USSG §3C1.2.

1 addition, courts are required to consider all of the factors listed in 18 U.S.C. § 3553(a) in  
2 imposing sentence. *Id.* Furthermore, the range of choice in sentencing dictated by the facts of  
3 the case has been significantly broadened. *Gall v. United States*, No. 06-7949, 552 U.S. \_\_\_, 128  
4 S. Ct. 586, 602 (2007)(finding a sentence outside the Guidelines to be reasonable); *Kimbrough v.*  
5 *United States*, No. 06-6330, 552 U.S. \_\_\_, 128 S. Ct. 558, 570 (2007)(noting that courts may vary  
6 from the Guidelines ranges based solely on policy considerations, including disagreements with  
7 the Guidelines). Accordingly, the “Guidelines are not the only consideration, the district judge  
8 should consider all of the section 3553 factors” to determine the appropriate sentence. *Gall*,  
9 \_\_U.S. \_\_\_, 128 S. Ct. at 596. The primary directive in §3553(a) is that the Court must impose a  
10 sentence that is “sufficient, but not greater than necessary, to comply with” the purposes of  
11 sentencing. *See* 18 U.S.C. §3553(a).

12 In this case, a sentence of 60 months in custody is sufficient to meet the purposes of  
13 sentencing. Some of the factors which the Court should consider are discussed below.

14 **1. Nature and Circumstances of the Offense**

15 Under 18 U.S.C. §3553(a), the Court should consider the nature and circumstances of the  
16 offense in determining an appropriate sentence. Here, David Shivers possessed over five grams  
17 of cocaine base and he also possessed a firearm. The offense is a serious one. However, it  
18 should be tempered by the fact that David Shivers had been doing well for approximately nine  
19 years before the current offense, with his last contact with law enforcement occurring in 1998.  
20 In November 2006, Mr. Shivers was shot in the hand and became depressed. In January 2007,  
21 his father-in-law had a stroke and Mr. Shivers lost his job. The fact that David Shivers stated  
22 that he is grateful to Cornell Corrections for teaching him how to get a job indicates that he did  
23 not have the skills to find another job before going to Cornell and yet he has 8 children to  
24

1 support. He now has those skills. It also is clear that he did not have the coping skills to deal  
2 with the shooting and loss of employment and depression productively. He therefore reverted to  
3 selling drugs. While the nature and circumstances of the offense is serious, the mitigating  
4 factors that led to his involvement in the offense warrant a sentence of no more than the  
5 mandatory minimum sentence of 60 months.

## 6 **2. History and Characteristics of David Shivers**

7 As discussed above, Mr. Shivers is a 30 year old man who was raised in the foster care  
8 system because his parents were both drug addicts. Mr. Shivers is a man who was surrounded by  
9 death at a young age and who still suffers greatly because of his losses. Mr. Shivers is a man  
10 who was grateful for learning how to seek employment and who thanked the Court for allowing  
11 him to spend time with his children. Mr. Shivers is a man who, despite his difficult childhood  
12 and lack of youthful guidance, managed to work and live a law-abiding life for approximately  
13 nine years with no contacts from law enforcement from 1998 until the current arrest in 2007.  
14 Unfortunately, Mr. Shivers must pay for his mistakes. Based upon his history and  
15 characteristics, however, the mandatory minimum sentence of 60 months is more than sufficient  
16 to meet the purposes of sentencing.

## 17 **3. A prison sentence of 60 months is sufficient to show respect for the law, just** 18 **punishment and adequate deterrence and no greater sentence is needed** 19 **either to protect the public or for training**

20 18 U.S.C. §3553 provides that the Court shall consider the need for a sentence to promote  
21 respect for the law, provide just punishment for the offense and afford adequate deterrence to  
22 criminal conduct. 18 U.S.C. §3553(a)(2)(A) and (B). Furthermore, the Court is required to  
23 consider the need to provide a defendant with needed educational or vocational training or other  
24 correctional treatment in the most effective manner. 18 U.S.C. §3553(a)(2)(D). All of these  
factors support a sentence of no more than 60 months in custody.

1 A sentence of 60 months under the circumstances is more than sufficient to show respect  
2 for the law where Mr. Shivers was law abiding for approximately nine years. As a result of the  
3 offense, David Shivers will miss out on his many children's lives for five years and will be  
4 forced to give up the freedom he's now enjoyed for almost a decade. Mr. Shivers indicates in his  
5 letter to the Court that if he were in the same spot, he now understands that he has a lot of people  
6 that he could talk to. Exhibit A. The other letters show how Mr. Shivers has worked hard to  
7 become the man he is today. A custodial sentence of 60 months is more than enough to show  
8 respect for the law and provide adequate deterrence to himself and others. It also represents  
9 more than just punishment.

10 Furthermore, Mr. Shivers does not need to be in custody more than 60 months in order to  
11 be provided with any "needed educational, vocational or other correctional treatment." 18  
12 U.S.C. §3553(a)(2)(D). He has obtained his GED already. He is asking that the Court  
13 recommend him for the 500 hour drug program even though he is aware that he will not get a  
14 reduced sentence because he knows it will help him. But the program only takes nine months to  
15 complete. In addition, 60 months is more than enough time to complete any other programs  
16 which may be available to Mr. Shivers to help him be better prepared once he finishes his  
17 sentence. Thus, a sentence of 60 months is more than adequate to provide him with needed  
18 treatment.

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1  
2 **CONCLUSION**

3 For all of the reasons described above, David Shivers respectfully asks the Court to  
4 sentence him to 60 months in custody.

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6 Dated: January 24, 2008

7 Respectfully submitted,

8 BARRY J. PORTMAN  
Federal Public Defender

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10 JOYCE LEAVITT  
11 Assistant Federal Public Defender  
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